

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

DANELL SMITH,

Petitioner,  
v.  
Civ. No. 04-70961  
Crim. No. 00-80762

UNITED STATES OF AMERICA,  
Honorable John Corbett O'Meara  
Respondent.

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**ORDER DENYING SUPERSEDING APPLICATION FOR  
CERTIFICATE OF APPEALABILITY**

On January 28, 2005, petitioner Danell Smith filed a second motion to vacate sentence under 28 U.S.C. § 2255. The government filed a response April 4, 2005.

In his second motion Petitioner relies in part on the recent decision of the United States Supreme Court in Booker v. Washington, 124 S. Ct. 2531 (2005). Petitioner Smith's reliance is unfounded, however. The Court in Booker explicitly provided that its holding was to apply only "to all cases on direct review." Id. at 769. The United States Court of Appeals for the Sixth Circuit has held that the Booker ruling is not retroactive to cases on post-conviction review. Humphress v. United States, 398 F.3d 855, 860-63 (6th Cir. 2005).

In addition, the court must deny Smith's second § 2255 motion because he failed to follow the procedure for filing a successive motion. Title 28 U.S.C. § 2244(b)(3) provides,

Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

In this case petitioner Smith neither sought nor obtained the Sixth Circuit's authorization to file this petition. Therefore, is it hereby **ORDERED** that petitioner Danell Smith's successive § 2255 motion is **DENIED**.

s/John Corbett O'Meara  
John Corbett O'Meara  
United States District Judge

Dated: May 5, 2005